

SAMUEL NAIK SIANG TING & ORS v. PUBLIC BANK BHD

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COURT OF APPEAL, PUTRAJAYA

SULAIMAN DAUD JCA

MOHAMED APANDI ALI JCA

MOHTARUDIN BAKI JCA

[CIVIL APPEAL NO: A-02(IM)-2270-09-2011]

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30 OCTOBER 2013

CIVIL PROCEDURE: *Affidavits – Rules of the High Court 1980, O. 14A – Application for – Land matters – Assignment of rights, titles and interests in land – Caveatable interests of parties – Defeasibility of titles – Application for issues arising out of dispute to be determined based on pleadings and construction of documents – Whether action suitable to be disposed by way of O. 14A of the Rules of the High Court 1980 – Whether there was fraud – Whether action comprised matters of facts which could only be decided at trial*

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LAND LAW: *Interest in property – Assignment of rights, titles and interests in land – Caveatable interests of parties – Defeasibility of titles – Allegation of error – Bank sought recovery of borrowers' interest over land – Application for issues arising out of dispute to be determined based on pleadings and construction of documents – Whether action suitable to be disposed by way of O. 14A Rules of the High Court 1980 – Whether there was fraud – Whether action comprised matters of facts which could only be decided at trial*

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Majlis Perbandaran Manjung, Lumut ('MPM') was the registered proprietor of a land before it was subsequently divided into Lots 3, 4, 5, 6 and 7 ('the said lots'). In all the deeds of assignments of the said lots, MPM and Bersatu Maju Properties Sdn Bhd ('the 10th defendant') had severally granted Public Bank Bhd ('the plaintiff') consent and an undertaking that the documents of title of the said lots would be transferred to the plaintiff upon the subdivision of the master title together with valid documents of transfer to transfer the lots to the plaintiff. Later, the plaintiff informed MPM of an error and requested MPM's cooperation to recover the plaintiff's and the first to fifth borrowers' interest. The first to fifth defendants defaulted in payment of the facilities, prompting the plaintiff to commence actions against them. The plaintiff raised the issues of (i) whether the plaintiff was an equitable mortgagee having an absolute assignment of rights, titles and interests in the lands and under the respective sales and purchase agreements; (ii) whether the subsequent sales and/or transfers and/or conveyances of the lands by the sixth and 10th defendants to the first to the fifth defendants were *void ab initio*; (iii) whether the alleged registered titles of the first, second and third defendants in Lots 5, 6 and 7 were defeasible and liable to be set aside; and (iv) whether the fourth and fifth defendants had any caveatable interests in Lots 3 and 4. The plaintiff applied for the arising issues to be determined by the court based on the pleadings and construction of documents without the need for a full trial, pursuant to O. 14A of the Rules of the High Court 1980

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A ('RHC'). The application was allowed by the High Court. Hence, the present appeal. The primary issue that arose in this appeal was whether the action was suitable to be disposed by way of O. 14A of the RHC, contending that allegations of fraud were matters of facts which could only be decided at the trial and not by contest of affidavits.

B **Held (dismissing appeal with costs)**

Per Mohtarudin Baki JCA delivering the judgment of the court:

C (1) The purchasers had assigned absolutely all their rights, titles and interests under the sale and purchase agreements of the land to the plaintiff. Other than the plaintiff, no one was entitled to deal with the said lots without its consent. The deeds of assignments were treated as equitable mortgages (where the plaintiff was an equitable mortgagee) of the purchasers' rights, titles and interests under the agreement in respect of Lots 3, 4, 5, 6 and 7. The sales of the lots by the sixth and 10th defendants to the first to fifth defendants without the plaintiff's consent were *void ab initio*. (paras 21 & 22)

E (2) The subsequent sales, transfer or conveyances of the said lots by the sixth and 10th defendants to the first to fifth defendants were *void ab initio* because upon receipt of the full payment of the purchase price, the sixth defendant, being the registered owner, became a bare trustee and had no right to deal with the lands to the first to fifth defendants. The sixth defendant had divested of all rights, titles and interests in the land upon receipt of the full purchase price. As a bare trustee, the sixth defendant did not have any legal or requisite capacity to enter into the sale and purchase agreement with the first to fifth defendants. (para 23)

F (3) Since the sale and purchase agreement and instruments of transfer were void, it followed that the purported registered titles of the first to the third defendants in Lots 5 to 7 were defeasible and ought to be set aside by virtue of s. 340(2) of the National Land Code ('NLC'). The contention that the first to third defendants were *bona fide* purchasers for value for money without notice was without merit. Section 340(3) of the NLC did not confer any protection to the first to third defendants who claimed that they were the immediate purchasers of Lots 5 to 7. The registered titles for the first to third defendants for Lots 5 to 7 ought to be set aside. (paras 24, 25 & 26)

H (4) The plaintiff was an absolute assignee and equitable mortgagee of the rights, titles and interests in the lands. Upon issuance of the individual title, the plaintiff was entitled under the terms of the deeds of assignment to register legal charges over the land. Both the sixth and 10th defendants had consented to and were obliged under the letter of undertaking to deliver the individual documents of title to the plaintiff upon the issuance of the documents to enable the plaintiff to register its legal charge of the lands. (para 28)

Bahasa Malaysia Translation Of Headnotes

Majlis Perbandaran Manjung, Lumut ('MPM') merupakan pemilik berdaftar sebidang tanah sebelum ia dibahagikan kepada Lot 3, 4, 5, 6 dan 7 ('lot-lot tersebut'). Dalam kesemua surat ikatan penyerahakkan, MPM dan Bersatu Maju Properties Sdn Bhd ('defendan ke-10') telah memberikan Public Bank Bhd ('plaintif') kebenaran dan akujanji bahawa dokumen-dokumen hak milik ke atas lot-lot tersebut akan dipindah milik kepada plaintif selepas pecah bahagian hak milik utama bersama-sama dengan dokumen pindah milik yang sah untuk memindah milik lot-lot tersebut kepada plaintif. Kemudian, plaintif memaklumkan kepada MPM mengenai kekhilafan dan memohon kerjasama MPM untuk mendapatkan semula kepentingan plaintif dan peminjam pertama hingga kelima. Defendan pertama hingga kelima telah ingkar dalam pembayaran kemudahan, menyebabkan plaintif memulakan tindakan-tindakan terhadap mereka. Plaintif membangkitkan isu-isu (i) sama ada plaintif adalah pemegang gadai janji berekuiti yang mempunyai penyerahakkan mutlak ke atas hak-hak, hak milik dan kepentingan pada tanah-tanah di bawah setiap perjanjian jual beli; (ii) sama ada jualan terkemudian dan/atau pindah milik dan/atau pindahan tanah-tanah oleh defendan keenam dan ke-10 kepada defendan pertama hingga kelima adalah *void ab initio*; (iii) sama ada pendaftaran hak milik defendan pertama, kedua dan ketiga dalam Lot 5, 6 dan 7 seperti yang didakwa, boleh disangkal dan boleh diketepikan; dan (iv) sama ada defendan keempat dan kelima mempunyai kepentingan boleh kaveat dalam Lot 3 dan 4. Plaintif memohon agar isu-isu yang dibangkitkan ini diputuskan oleh mahkamah berdasarkan pliding dan pembentukan dokumen-dokumen tanpa perbicaraan penuh, di bawah A. 14A Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT'). Permohonan dibenarkan oleh Mahkamah Tinggi. Oleh itu, rayuan ini. Isu utama yang dibangkitkan dalam rayuan ini adalah sama ada tindakan sesuai diselesaikan berdasarkan A. 14A KMT, atas hujahan bahawa dakwaan-dakwaan penipuan adalah perkara-perkara fakta yang hanya boleh diputuskan semasa perbicaraan dan bukan pertikaian affidavit-afidavit.

Diputuskan (menolak rayuan dengan kos)**Oleh Mohtarudin Baki HMR menyampaikan penghakiman mahkamah:**

- (1) Pembeli-pembeli telah menyerahkan kepada plaintif kesemua hak-hak, hak milik dan kepentingan mereka secara mutlak di bawah perjanjian jual beli tanah. Selain daripada plaintif, tiada siapa yang berhak untuk menjalankan urusan ke atas tanah tersebut tanpa kebenarannya. Surat ikatan penyerahakkan dianggap sebagai gadai janji berekuiti (dalam mana plaintif merupakan pemegang gadai janji berekuiti) ke atas hak-hak, hak milik dan kepentingan pembeli-pembeli di masa perjanjian berkaitan Lot 3, 4, 5, 6 dan 7. Jualan lot-lot tersebut oleh defendan keenam dan ke-10 kepada defendan pertama hingga kelima tanpa kebenaran plaintif adalah *void ab initio*.

- A (2) Jualan, pindah milik atau pindahan susulan lot-lot oleh defendan keenam dan ke-10 kepada defendan pertama hingga kelima adalah *void ab initio* kerana setelah menerima bayaran penuh harga belian, defendan keenam, sebagai pemilik berdaftar, menjadi pemegang amanah sahaja dan tidak mempunyai hak untuk menguruskan tanah-tanah tersebut kepada defendan pertama hingga kelima. Defendan keenam telah melepaskan kesemua hak-hak, hak milik dan kepentingan ke atas tanah setelah menerima harga belian penuh. Sebagai pemegang amanah sahaja, defendan keenam tidak mempunyai sebarang kapasiti perundangan atau yang diperlukan untuk memasuki perjanjian jual beli dengan defendan pertama hingga kelima.
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- C (3) Oleh kerana perjanjian jual beli dan instrumen pindah milik adalah terbatal, hak milik berdaftar defendan pertama hingga ketiga yang didakwa dalam Lot 5 hingga 7 boleh disangkal dan wajar diketepikan di bawah s. 340(2) Kanun Tanah Negara ('KTN'). Dakwaan bahawa defendan pertama hingga ketiga adalah pembeli-pembeli *bona fide* bagi nilai kewangan tanpa notis adalah tidak bermerit. Seksyen 340(2) KTN tidak memperuntukkan sebarang perlindungan kepada defendan pertama hingga ketiga yang mendakwa bahawa mereka merupakan pembeli-pembeli Lot 5 hingga 7. Hak milik berdaftar bagi defendan pertama hingga ketiga ke atas Lot 5 hingga 7 wajar diketepikan.
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- E (4) Plaintiff merupakan pemegang gadai janji mutlak dan pemegang gadai janji berekuiti hak-hak, hak milik dan kepentingan pada tanah. Dengan pengeluaran hak milik individu, plaintiff berhak, di bawah terma surat ikatan penyerahakkan untuk mendaftarkan pajakan yang sah ke atas tanah tersebut. Defendan keenam dan ke-10 telah bersetuju dan berkewajipan di bawah surat akujanji untuk menyerahkan dokumen-dokumen individu kepada plaintiff dengan pengeluaran dokumen-dokumen untuk membolehkan plaintiff mendaftarkan pajakan yang sah ke atas tanah-tanah tersebut.
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G **Case(s) referred to:**

Tan Ying Hong v. Tan Sian San & Ors [2010] 2 CLJ 269 FC (*refd*)

Legislation referred to:

National Land Code 1965, ss. 304(3), 323(1), 340(2)(b)

Rules of the High Court 1980, O. 14A

- H *For the appellants - M/s Chan & Assocs*
For the respondent - M/s Shook Lin & Bok

[Appeal from High Court, Ipoh; Suit No: M3-22-206-2007]

Reported by Najib Tamby

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JUDGMENT

Mohtarudin Baki JCA:

[1] This appeal arose from the decision by the High Court in allowing the respondent's application *vide* encl. 62 pursuant to O. 14A of the Rules of the High Court 1980 (RHC).

[2] We heard the appeal on 22 March 2012 and unanimously, we dismissed the appeal with costs of RM5,000. We also ordered that the deposit to be deposited to the respondent's account of costs.

[3] For ease of reference, we shall refer to the parties of this appeal as they appear in the court below ie, the appellants as the 'defendants' and the respondent as the 'plaintiff' respectively.

The Agreed Facts

[4] The sixth defendant ie, Majlis Daerah Manjung, Lumut (known as 'Majlis Perbandaran Manjung, Lumut' or 'MPM') is the registered proprietor of the land held under master title H.S.(D) Dgs 11103, P.T. No. 4108, Mukim Sitiawan, District of Manjung (the master title) before it was subsequently divided as follows:

(i) Lot 3

Vide the first sale and purchase agreement dated 10 October 2001, the sixth defendant and the Bersatu Maju Properties Sdn Bhd (tenth defendant) jointly agreed to sell Lot 3 to the first borrower for a purchase price of RM588,888. At the request of the first borrower, the plaintiff had (*vide* first letter of offer dated 11 October 2001) offered a fixed loan facility with RM300,000 credit limit (first fixed loan), which terms and conditions contained therein and the first fixed loan agreement was duly accepted by the first borrower. The first borrower shall assigned all of his rights and interests in the agreement and the said Lot 3 to the plaintiff as consideration. MPM and the tenth defendant executed a letter of consent to the plaintiff pertaining to the first deed of assignment (dated 16 October 2001) and gave an undertaking to surrender the documents of title of Lot 3 to the plaintiff upon master title being subdivided to allow the plaintiff to execute the transfer of Lot 3 to the first borrower.

(ii) Lot 4

Vide the second sale and purchase agreement dated 10 October 2001, MPM and the tenth defendant had jointly agreed to sell Lot 4 to the second borrowers for RM588,888. At the second borrowers' request, the plaintiff (*vide* second letter of offer dated 11 October 2001) offered a fixed loan facility with credit limit of RM300,000 (second fixed loan

- A facility) to them where the terms and conditions contained in the second loan agreement and the second fixed loan facility was duly accepted by the second borrower. The second borrower assigned all of their rights and interests in the second sales and purchase agreement of Lot 4 to the plaintiff as consideration. MPM and the tenth defendant had executed
- B a letter of consent to the plaintiff pertaining to the second deed of assignment and gave an undertaking to surrender the documents of title of Lot 4 to the plaintiff upon subdivision of the master title in order to allow the plaintiff to execute the transfer of Lot 4 to the second borrower.
- C (iii) Lot 5
- D *Vide* the third sale and purchase agreement dated 5 November 2001, MPM and the tenth defendant had jointly agreed to sell part of the land known as Lot 5 to the third borrower for RM588,888. At the third borrower's request, the plaintiff *vide* third letter of offer dated 11 October 2001 offered a fixed loan facility with credit limit of RM353,000 (third fixed loan facility) to them where the terms and conditions contained in the third loan agreement and the second fixed loan facility was duly accepted by the third borrower. The third borrower assigned all of their rights and interests in the second sales and
- E purchase agreement of Lot 5 to the plaintiff as consideration. MPM and the tenth defendant had executed a letter of consent to the plaintiff pertaining to the third deed of assignment and gave an undertaking to surrender the documents of title of Lot 5 to the plaintiff upon subdivision of the master title in order to allow the plaintiff to execute
- F the transfer of Lot 5 to the third borrower.
- (iv) Lot 6
- G *Vide* the fourth sale and purchase agreement dated 12 December 2001, MPM and the tenth defendant had jointly agreed to sell Lot 4 to the fourth borrower for a purchase price of RM588,888. At the fourth borrower's request, the plaintiff *vide* fourth letter of offer dated 13 December 2001 offered a fixed loan facility with credit limit of RM300,000 (fourth fixed loan facility) to them where the terms and conditions contained in the fourth loan agreement and the fourth fixed loan facility was duly accepted by the fourth borrower. The fourth
- H borrower assigned all of their rights and interests in the fourth sales and purchase agreement of Lot 6 to the plaintiff as consideration. MPM and the tenth defendant had executed a letter of consent to the plaintiff pertaining to the fourth deed of assignment and gave an undertaking to surrender the documents of title of Lot 6 to the plaintiff upon
- I subdivision of the master title in order to allow the plaintiff to execute the transfer of Lot 6 to the fourth borrower.

(v) Lot 7

Vide the fifth sale and purchase agreement dated 12 December 2001, MPM and the tenth defendant had jointly agreed to sell part of the land known as Lot 7 to the fifth borrowers for a purchase price of RM588,888. At the fifth borrower's request, the plaintiff *vide* fifth letter of offer dated 22 January 2002 offered a fixed loan facility with credit limit of RM300,000 (fifth fixed loan facility) to them where the terms and conditions contained in the fifth loan agreement and the fifth fixed loan facility was duly accepted by the fifth borrower. The fifth borrower assigned all of their rights and interests in the fifth sales and purchase agreement of Lot 7 to the plaintiff as consideration. MPM and the tenth defendant had executed a letter of consent to the plaintiff pertaining to the fifth deed of assignment and gave an undertaking to surrender the documents of title of Lot 7 to the plaintiff upon subdivision of the master title in order to allow the plaintiff to execute the transfer of Lot 7 to the fifth borrower.

[5] In all the above deeds of assignment, MPM and the tenth defendant had severally granted the plaintiff consent to the said assignment and an undertaking that the documents of title of the lots would be transferred to the plaintiff upon the subdivision of the master title together with valid documents of transfer to transfer the lots to the plaintiff.

[6] On June 2002 and February 2003, the loan sum granted by the plaintiff to all the borrowers was fully paid by the tenth defendant and/or MPM. The full purchase price for all the respective lots were paid and received by the tenth defendant and MPM. The master title was subsequently subdivided and interim documents of title were issued by the Registry of Land Title, Perak on 27 June 2003.

[7] In March 2004, MPM received three copies of the sales and purchase agreements dated 22 March 2004, executed between the first, second and third defendants and the tenth defendant for the sale of Lot 5, 6 and 7 respectively. The plaintiff's solicitor had issued letters dated 1 March 2004 and 24 December 2004 to the tenth defendant in respect of the issuance of individual documents of title for Lot 3, 4, 5, 6 and 7 but the tenth defendant failed to respond to the letters.

[8] On 6 December 2004, Lot 5, 6 and 7 were registered in the name of the first, second and third defendants. MPM and the tenth defendant subsequently transferred Lot 3 and 4 to the fourth and fifth defendants respectively (*vide* sales and purchase agreement dated 11 January 2005).

[9] Upon discovering that the individual titles had been issued, the plaintiff entered a private caveat over the said land sometime in January 2005. The fourth and fifth defendants also entered a private caveat on 5 January 2005. The plaintiff through its solicitors informed MPM of the said error *vide* a letters, requesting MPM's cooperation to recover the

A plaintiff's and the first to fifth borrowers' interests. Subsequently, MPM issued letters dated 8 March 2005 and 14 March 2005 to the first to fifth defendants' solicitors, seeking clarifications of the sales and purchase agreement dated 22 March 2004 and 11 January 2005.

B [10] The first to fifth defendants defaulted the payment of the said facilities and the plaintiff commenced actions against them and had on 4 October 2005, 12 November 2004, 14 September 2004, 2 November 2004 and 23 November 2004 obtained judgment in default of appearance against the first to fifth borrowers respectively. The first to third defendants had applied for the removal of the private caveats no. 183, 184 and 185/2005.

C [11] Application for disposal of case on point of law under O. 14A of the RHC 1980.

D [12] *Vide* summons in chambers, the plaintiff *vide* encl. 62 applied for the issues as set out in 'Annexure A' to be determined by the court based on the pleadings and construction of documents without the need for a full trial pursuant to O. 14A of the RHC.

[13] We summarised the questions of law as stated in 'Annexure A' of the plaintiff's summons in chambers ie, encl. 62 as follows:

E (a) Whether the plaintiff is an equitable mortgagee having an absolute assignment of rights, title and interests in the lands and under the respective sales and purchase agreement?

F (b) Whether the subsequent sales and/or transfers and/or conveyances of the lands by the sixth and tenth defendants to the first to fifth defendants are *void ab initio*?

(c) Whether the alleged registered titles of the first, second and third defendants in Lot 5, 6 and 7 respectively are defeasible and liable to be set aside?

G (d) Whether the fourth and fifth defendants have any caveatable interests in Lot 3 and 4?

Decision Of The High Court

H [14] On 27 July 2011, the High Court ruled that the plaintiff's application under O. 14A RHC against the first to fifth defendant is allowed. Consequentially, the High Court made various declarations as per the 'PENGHAKIMAN' (at pp. 11 - 16 of the Appeal Record) *inter alia* are as follows:

I MAKAPADA HARI INI DIHAKIMKAN bahawa penghakiman dicatatkan memihak kepada Plaintiff terhadap Defendan-defendan pertama, Ke-2, Ke-3, Ke-4 dan Ke-5 dan setiap satu daripada mereka seperti berikut:

- (a) Deklarasi bahawa: A
- (i) Mohd Yusoff Bin Bahrom adalah pemilik sah hartanah yang dikenali sebagai H.S.(D) 18439 No. PT 24898, Mukim Sitiawan, Daerah Manjung, Negeri Perak;
 - (ii) Ong Kee Chai dan Ong Lai King adalah pemilik-pemilik sah hartanah yang dikenali sebagai H.S.(D) 18440 No. PT 24899, Mukim Sitiawan, Daerah Manjung, Negeri Perak; B
 - (iii) Wong Siew Ming adalah pemilik sah hartanah yang dikenali sebagai H.S.(D) 18441 No. PT 24900, Mukim Sitiawan, Daerah Manjung, Negeri Perak;
 - (iv) Ong Sang Huat Holdings Sdn Bhd adalah pemilik sah hartanah yang dikenali sebagai H.S.(D) 18442 No. PT 24901, Mukim Sitiawan, Daerah Manjung, Negeri Perak; dan C
 - (v) Lim Peng Guan & Beatrice Veronica Arulappen adalah pemilik-pemilik sah hartanah yang dikenali sebagai H.S.(D) 18443 No. PT 24902, Mukim Sitiawan, Daerah Manjung, Negeri Perak. D
 - (vi) (selepas ini tanah-tanah tersebut secara kolektif dirujuk sebagai "Hartanah-Hartanah tersebut");
- (b) Deklarasi bahawa Plaintiff adalah penerima hakmilik dan kepentingan yang sah ("legal assignee") Hartanah-Hartanah tersebut di bawah Suratikatan Penyerahanhak-Suratikatan Penyerahanhak yang bertarikh 16.10.2001, 16.10.2001, 30.11.2001, 13.12.2001 dan 22.1.2002 ("secara kolektif dirujuk selepas ini sebagai "Suratikatan-Suratikatan Penyerahanhak tersebut") masing-masing; E
- (c) Deklarasi bahawa perjanjian jualbeli-perjanjian jualbeli bertarikh 22.3.2004 dan 11.1.2005 yang telah dilaksanakan oleh Defendan Pertama, Kedua, Ketiga, Keempat dan Kelima dengan Defendan Keenam dan Defendan Kesepuluh adalah tidak sah dan dibatalkan; F
- (d) Deklarasi bahawa Pindahmilik hartanah-hartanah yang dipegang di bawah H.S.(D) 18441 No. PT 24900, H.S.(D) 18442 No. PT 24901 dan H.S.(D) 18443 No. PT 24902, kesemuanya di Mukim Sitiawan, Daerah Manjung, Negeri Perak yang dilaksanakan oleh Defendan Keenam kepada Defendan-Defendan Pertama, Kedua dan Ketiga adalah terbatal dan tidak sah pada awalnya (*void ab initio*) dan pendaftaran Pindahmilik tersebut dibatalkan dengan segera dan bahawa Pendaftar Tanah hendaklah melakukan segala yang perlu untuk memastikan pembatalan sedemikian dalam tempoh tujuh (7) hari dari pemberitahuan bertulis mengenai Perintah ini kepada Pendaftar Tanah; G
- (e) Perintah bahawa Defendan Pertama, Kedua, Ketiga, Keempat dan Kelima menyerahkan suratan-suratan hakmilik yang asal Hartanah-Hartanah tersebut dalam tujuh (7) hari daripada tarikh perintah ini; H
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- A (f) Pindahmilik hartanah-hartanah yang dipegang di bawah H.S.(D) 18439 No. PT 24898, H.S.(D) 18440 No. PT 24899, kesemuanya di Mukim Sitiawan, Daerah manjung, Negeri Perak yang dilaksanakan oleh Defendan Keenam kepada Defendan-Defendan Keempat dan Kelima adalah terbatal dan tidak sah pada awalnya (*void ab initio*);
- B (g) Kaveat Persendirian yang didaftarkan di bawah Perserahan No. 71/2005 dan telah dimasukkan oleh Defendan Keempat dan Kelima terhadap tanah-tanah yang dipegang di bawah H.S.(D) 18439 No. PT 24898, H.S.(D) 18440 No. PT 24899, kesemuanya di Mukim Sitiawan, Daerah Manjung, Negeri Perak dan mana-mana Kaveat Persendirian yang didaftarkan selepas itu oleh Defendan-Defendan Keempat dan/atau Kelima atau nomininya ke atas tanah-tanah tersebut dibatalkan dengan segera dan bahawa Pendaftar Tanah melakukan segala yang perlu untuk memastikan pembatalan sedemikian dalam tempoh tujuh (7) hari dari pemberitahuan bertulis mengenai Perintah ini kepada Pendaftar Tanah;
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- D (h) Injunksi untuk menghalang Defendan-Defendan Pertama, Kedua, Ketiga, Keempat dan Kelima atau pengkhidmat mereka atau ejen mereka atau penama-penama mereka atau wakil-wakil mereka atau sesiapaupun dan walau bagaimana cara sekalipun dari memasuki apa-apa perjanjian untuk menjual, memindahkan hakmilik, menggadai, menyewa, menggadai-janjikan atau sebarang urusan atau menjalankan apa-apa aktiviti fizikal ke atas Hartanah-Hartanah tersebut;
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- (i) Perintah bahawa Defendan Keenam membatalkan nama-nama Defendan Pertama, Kedua, Ketiga, Keempat dan Kelima daripada suratan-suratan hakmilik Hartanah-Hartanah tersebut dan mendaftarkan Mohd Yusoff Bin Bahrom, Ong Kee Chai dan Ong Lai King, Wong Siew Ming, Ong Sang Huat Holdings Sdn Bhd, Lim Peng Guan & Beatrice Veronica Arulappen masing-masing sebagai pemilik-pemilik yang sah bagi Hartanah-Hartanah tersebut (sepertimana yang dinyatakan di perenggan (a) diatas) dan mendaftarkan Plaintiff sebagai penerima gadaian ("chargee") ke atas setiap satu Hartanah-Hartanah tersebut menurut terma-terma dan syarat-syarat yang terkandung di dalam Suratikatan-Suratikatan Penyerahan Hak dan Seksyen 380 Kanun Tanah Negara 1965, dan sekiranya gagal berbuat demikian, maka Pendaftar Tanah hendaklah melaksanakan yang sama dalam tempoh tujuh (7) hari dari pemberitahuan bertulis mengenai Perintah ini; dan
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- H (j) Bahawa Defendan-Defendan membayar kos tindakan ini kepada Plaintiff.

The Appeal

- I [15] Despite numerous grounds of appeal stated in the memorandum of appeal, the learned counsel for the appellant/defendant's submission before us only centered on the issue that particulars of fraud had been pleaded in para. 34 of the respondent/plaintiff's amended statement of claim (p. 34 of the appeal record) which stated that:

34. Akibat tindakan *mala fide*, berniat tipuan (fraud) dan salah di sisi undang-undang oleh MPM dan BMP yang tersebut di atas, Plaintiff telah mengalami kerugian dan kesusahan dan Defendan-Defendan adalah bertanggung secara berasingan dan bersama atas segala kerugian dan kesusahan yang dialami oleh Plaintiff. A

[16] Therefore, it is the appellant/defendant's submission that the action is not suitable to be disposed of by way of O. 14A RHC. It was further submitted that, allegations of fraud were matters of facts which could only be decided at the trial and not by contest of affidavits. B

[17] In reply, the solicitors for the plaintiff/respondent submitted that since the parties had agreed that this matter to be disposed of by way of O. 14A RHC coupled with the first, second and third defendants' affidavit in reply of the plaintiff's affidavit in support of the O. 14A application (p. 100 of the appeal record) which stated that: C

15. Saya dinasihati dan sesungguhnya percaya bahawa isu-isu dan persoalan-persoalan yang dinyatakan oleh Plaintiff boleh diputuskan oleh Mahkamah Yang Mulia ini tanpa perbicaraan penuh ... D

Decision

[18] We are in complete agreement with the plaintiff's submission that it is trite that the parties are bound by their own pleading and the defendants had agreed that this matter should be disposed of by O. 14A RHC. E

[19] Since we are unable to see the written judgment of the learned trial judge as the document are not presented before us, we shall now give our reasons in dismissing the appellant's appeal.

Question 1

[20] We have the opportunity to peruse cl. 1 (under the heading of "ABSOLUTE ASSIGNMENT") of the deeds of assignment which stated (at volume 5 of the appeal record) that: F

... the Assignor as beneficial owner of the said Property hereby assigns absolutely to the Bank the full and entire benefit of the Assignor's rights title and interest ... under the Sale and Purchase Agreement and in the said Property ... as security for the said Loan ... G

[21] We are of the considered view that the purchasers have assigned absolutely all their rights, title and interests under the sale and purchase agreements of the land to the plaintiff ie, the bank. Other than the plaintiff, no one is entitle to deal with the said lots without its consent. We hold that the deeds of assignment are treated as an equitable mortgages (where the plaintiff is an equitable mortgagee) of the purchasers' rights, titles and interests under the agreement in respect of Lot 3, 4, 5, 6 and 7. H

[22] Therefore, we find that the sales of the lots by the sixth and tenth defendants to the first to fifth defendants without the plaintiff's consent are *void ab initio*. We affirm the High Court decision on this issue. I

A Question 2

[23] Following the above reasoning in question 1, we are of the considered view that the subsequent sales, transfers or conveyances of the said lots by the sixth and tenth defendants to the first to fifth defendants are *void ab initio* because:

- B** (i) upon receipt of the full payment of the purchase price on 13 February 2003, the sixth defendant, being the registered owner became a bare trustee and has no right to deal with the lands to the first to the fifth defendants;
- C** (ii) the sixth defendant had divested of all rights, title and interest in the lands upon receipt of the full purchase price; and
- (iii) as a bare trustee, the sixth defendant does not have any legal or requisite capacity to enter into the sale and purchase agreement dated 22 March 2004 and 11 January 2005 with the first to fifth defendants.

D Thus, we found that this question should be answered in the affirmative and the decision of the High Court on this issue is hereby affirmed.

Question 3

E **[24]** In the instant case, it is clear that since the sale and purchase agreement dated 22 March 2004 and 11 January 2005 and the transfer instruments of transfer are void, it follows that the purported registered titles of the first to third defendants in Lot 5 to 7 are defeasible and ought to be set aside by virtue of s. 340(2)(b) of the National Land Code 1965 (NLC) which stated is follows:

- F** 340. Registration to confer indefeasible title or interest, except in certain circumstances
- G** (1) The title or interest of any person or body for the time being registered as proprietor of any land, or in whose name any lease, charge or easement is for the time being registered, shall, subject to the following provisions of this section, be indefeasible.
- (2) The title or interest of any such person or body shall not be indefeasible:
- H** (a) in any case of fraud or misrepresentation to which the person or body, or any agent of the person or body, was a party or privy; or
- (b) where registration was obtained by forgery, or by means of an insufficient or void instrument; or
- I** (c) where the title or interest was unlawfully acquired by the person or body in the purported exercise of any power or authority conferred by any written law.

- (3) Where the title or interest of any person or body is defensible by reason of any of the circumstances specified in subsection (2): A
- (a) it shall be liable to be set aside in the hands of any person or body to whom it may subsequently be transferred; and
- (b) any interest subsequently granted there out shall be liable to be set aside in the hands of any person or body in whom it is for the time being vested: B
- Provided that nothing in this subsection shall affect any title or interest acquired by any purchaser in good faith and for valuable consideration, or by any person or body claiming through or under such a purchaser. C
- (4) Nothing in this section shall prejudice or prevent:
- (a) the exercise in respect of any land or interest of any power of forfeiture or sale conferred by this Act or any other written law for the time being in force, or any power of avoidance conferred by any such law; or D
- (b) the determination of any title or interest by operation of law.
- [25]** It was contended by the first to third defendants that they are *bona fide* purchaser for value without notice. Therefore their rights and interests is indefeasible under the NLC. However, we found that this contention is without any merit. E
- [26]** We are of the considered view that s. 304(3) of the NLC did not confer any protection to the first to third defendants who claimed that they are the immediate purchasers of Lots 5 to 7. We find that the registered titles for the first to third defendants for Lots 5 to 7 ought to be set aside because: F
- (a) Both the plaintiff and the purchasers, being the absolute assignee of Lot 5 to 7, had consented to the sixth defendant to deal with the lands to the first to third defendants;
- (b) The sixth defendant, acting as bare trustee over Lot 5 to 7, has no authority to deal with the lots in favour of the first to third defendants; G
- (c) The sixth defendant has no authority or capacity to enter into the sale and purchase agreements dated 22.3.2004 and 11.1.2005 with the first to third defendants; H
- (d) The above sale and purchase agreements are void or insufficient instruments;
- (e) The purported transfers of Lots 5 to 7 by the sixth defendant to the respective defendants were based on void instrument;
- (f) The first to third defendants are not entitle to the statutory protection under section 340(3) NLC; and I

- A (g) On that basis, the first to third defendants' interests in the lots are defeasible and liable to be set aside pursuant to section 340(2)(b) of the NLC.

Case referred: *Tan Ying Hong v. Tan Sian San & Ors* [2010] 2 CLJ 269; [2010] 2 MLJ 1.

B **Question 4**

- C [27] This question relates to Lot 3 and 4 on which a caveat has been entered by the fourth and fifth defendants alleging that the land has been sold by the sixth and/or tenth defendants for value. Thus, they claimed that their interest prevail over the plaintiff's, who is an absolute assignee or equitable mortgagee. They claimed that their rights and interests over the said lots are protected under s. 323(1) of the NLC.

- D [28] In this case, the plaintiff has, upon discovery of the issuance of the individual titles of document entered a private caveat on the said lots ie, Lot 3 to 7 and claimed that that it has a caveatable interest of the lands because:

- E (a) The plaintiff is an absolute assignee and equitable mortgagee of the rights, title and interests in the lands;
- F (b) Upon issuance of the individual documents of title, the plaintiff is entitled under the terms of the deeds of assignment to register legal charges over the land; and
- (c) Both the sixth and the tenth defendants have consented to and are obliged under the letter of undertaking to deliver the individual documents of title to the plaintiff upon the issuance of the documents to enable the plaintiff to register its legal charges of the lands.

- G [29] Therefore, upon perusing all the appeal records, submissions and the authorities presented before us by both parties in this appeal, we are of the view that this appeal devoid of any merits and it should be dismissed with costs. The decision of the High Court is hereby affirmed.

H

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